# STATE OF MICHIGAN

# COURT OF APPEALS

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JIMMIE L. MURRY, JR.,

Plaintiff-Appellant,

V

B.J. YUCHASZ and JILL KULHANEK,

Defendants-Appellees,

and

JANE DOE,

Defendant.

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UNPUBLISHED
October 31, 2006

No. 268909
Washtenaw Circuit Court
LC No. 04-000900-NI

Before: Sawyer, P.J., and Wilder and Servitto, JJ.

Wilder, J., *(dissenting).*

I respectfully dissent.

On December 10, 2002, plaintiff's sister called 911 because of an altercation between herself and plaintiff. Plaintiff was subsequently arrested for domestic violence at the scene. The validity of the arrest is undisputed. In the complaint, however, plaintiff claimed that at the scene of the arrest, officers immediately began to "rough [him] up," and that officers grabbed plaintiff's arms and jerked them so hard in order to handcuff him, that they broke his wrist, and slammed their knees into plaintiff's face.

There is no genuine issue of material fact that: plaintiff was intoxicated; during the ride to the police station, and after arrival there, plaintiff was belligerent; plaintiff refused to be fingerprinted, and was pushing himself away from or into Officer Kulhanek, who was trying to fingerprint him; and Officer Kulhanek's supervisor told her to take plaintiff into the "detox cell" because he was combative. In the detox cell, officers placed plaintiff on the floor and removed his personal property and some of his clothes.

Later plaintiff was taken by Officer Yuchasz and another officer to the Washtenaw County Sheriff's Department (WCSD), to be lodged in the jail. During transport and on arrival, plaintiff continued to be obstreperous. While walking to the WCSD, plaintiff made movements suggesting he might be attempting to escape Officer Yuchasz's grasp, so Officer Yuchasz

employed a transport wrist lock, flexing plaintiff's wrist (palm toward the forearm) and applying pressure. It is undisputed that Officer Yuchasz employed a transport wrist lock. Plaintiff claims that the wrist lock fractured his wrist.[1] But x-rays from the same day revealed no fracture.

Later, plaintiff pled guilty to refusing to be finger printed, and the domestic violence charge was dismissed. In his complaint, plaintiff asserted claims of assault and battery (count I), and deprivation of federal rights under 42 USC 1983 (count III).

Defendants brought a motion for summary disposition under MCR 2.116(C)(7) and (C)(10), arguing, inter alia, that: (1) plaintiff attempted to flee; (2) plaintiff refused to be fingerprinted; (3) during transport to WCSD, plaintiff continued to resist officers by pulling away from them and being combative, and as a result, was temporarily placed in a wrist lock; (4) defendants have qualified immunity to the claims asserted in count III of the complaint; (5) there is no genuine issue of material fact.

Summary disposition is a question of law reviewed de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). For a motion under MCR 2.116(C)(10), the court considers pleadings, affidavits, admissions, depositions and other evidence in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Evidentiary materials "shall only be considered to the extent that the[y] . . . would be admissible as evidence . . . ." MCR 2.116(G)(6). If evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden, supra* at 120.

The majority concludes that the trial court erred in granting defendants summary disposition of the § 1983 claim. I disagree.

Qualified immunity is an established federal defense against damages claims under § 1983 for alleged violations of federal rights. *Harlow v Fitzgerald*, 457 US 800; 102 S Ct 2727; 73 L Ed 2d 396 (1982). Qualified immunity is a question of law for the court. *Spurlock v Satterfield*, 167 F3d 995, 1000 (CA 6,1999).

The doctrine applies an objective standard to the conduct of defendants, not their state of mind. *Harlow, supra* at 816.

> Bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burden of broad-reaching discovery. We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. [*Id*. at 817-818.]

It is a high standard. "A right is clearly established if there is binding precedent . . . that is directly on point." *Risbridger v Connelly*, 275 F3d 565, 569 (CA 6, 2002). "The contours of the

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[1] Plaintiff testified: "I guess [he] ben[t] it back till he broke it with the handcuffs on."

right must be sufficiently clear that a reasonable official would understand what he is doing violates that right." *Brosseau v Haugen*, 543 US 194, 198; 125 S Ct 596; 160 L Ed 2d 583 (2004) (internal quotation marks and citations omitted). *Hunter v Bryant*, 502 US 224, 227; 112 S Ct 534; 116 L Ed 2d 589 (1991), stated:

> First, . . . . [i]mmunity ordinarily should be decided by the court [and not the jury] long before trial. Second, the court should ask whether the agent acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the event can be constructed . . . after the fact. [Citations omitted.]

The United States Supreme Court has aggressively enforced the qualified immunity defense vis-à-vis fourth amendment claims. In *Saucier v Katz*, 533 US 194, 201; 121 S Ct 2151; 150 L Ed 2d 272 (2001), the court reaffirmed the strong protection provided, and reversed a court of appeals decision in which qualified immunity was denied because of concerns about the merits of the underlying fourth amendment claim. The court stressed that qualified immunity is immunity from suit and not merely from liability, and that the determination should be made as early in the proceedings as possible. *Id*. at 200. The court outlined two components:

1. "Taken in a light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id*. at 201. "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id*.

2. "[I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition . . . ." *Id*.

The court stressed that qualified immunity ought not be denied merely because of a genuine issue of fact on the merits of the underlying claim. *Id*. at 202-204. The issue of qualified immunity is distinct from the merits of a claim; indeed, liability on a constitutional claim does not preclude qualified immunity. *Wilson v Layne*, 526 US 603; 119 S Ct 1692; 143 L Ed 2d 818 (1999) (media "ride alongs" violate fourth amendment rights of homeowner, but this was not "clearly established," so qualified immunity applies).

The United States Supreme Court has continued to be aggressive in enforcing the broad protection of the qualified immunity defense against excessive force claims. In *Brosseau*, the Court held that a police officer, who used *deadly* force against a suspect fleeing in a motor vehicle, was entitled to qualified immunity from a § 1983 excessive force damages claim. The Court reversed the court of appeals, which had denied summary judgment. *Brosseau, supra* at 195.

In *Brosseau*, the Court reaffirmed the key distinction between the validity of the underlying claim, and the qualified immunity defense: "We express no view as to the correctness of the Court of Appeals' decision on the constitutional question itself. We believe that, *however that question is decided*, the Court of Appeals was wrong on the issue of qualified immunity." *Brosseau, supra* at 198 (emphasis added). "Qualified immunity shields an officer

from suit when she makes a decision that, *even if constitutionally deficient*, reasonably misapprehends the law governing the circumstances she confronted." *Id*. (emphasis added), citing *Saucier, supra* at 206.

Accordingly, this Court must first address the constitutional question of whether defendants violated plaintiff's fourth amendment rights. The fourth amendment provides, in relevant part: "The right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated . . . ." US Const, Am IV. A police officer is authorized to use reasonable force to effectuate a detention. *Muehler v Mena*, 544 US 93, 98-99; 125 S Ct 1465; 161 L Ed 2d 299 (2005); *Graham v Connor*, 490 US 386, 396-397; 109 S Ct 1865; 104 L Ed 2d 443 (1989). Hindsight is not the standard. "Not every push or shove, even if it may later seem unnecessary in [the] peace of a judge's chambers, violates the Fourth Amendment." *Saucier, supra* at 209. Deference must be accorded to the officer who needs to immediately react to a situation and make a split-second decision regarding the amount of force necessary under the circumstances. *Graham, supra* at 396.

A court must weigh the intrusion against the governmental interest behind it. *Muehler, supra* at 306. "In determining the reasonableness of a particular seizure, we must carefully balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *People v Hanna*, 223 Mich App 466, 471; 567 NW2d 12 (1997) (internal quotations marks and citation omitted).

Here, plaintiff's complaint alleges that at the scene of the alleged domestic violence, "[d]efendant Officers immediately began to rough up the Plaintiff[,]" and "grabbed Plaintiff's arms and jerked them so hard in order to handcuff him, that they broke his wrist and they slammed their knee into Plaintiff's face." There is no evidentiary support for these allegations. Plaintiff did not testify in his deposition that arresting officers used excessive force at the scene of the alleged crime. Viewing the evidence in a light favorable to plaintiff, plaintiff failed to raise a genuine issue of material fact.

Below plaintiff requested that the trial court grant him leave to amend his pleadings to conform to the evidence. Assuming *arguendo* that the trial court would have granted plaintiff's request, the question becomes whether summary disposition was still proper, on the claims of excessive force in the detox cell and at the WCSD. I would conclude that summary disposition was proper.

Evidence indicates that plaintiff was intoxicated, belligerent, and combative at the police station. According to her deposition, Officer Kulhanek "was trying to relieve him of his property, and he kept pushing off the back counter kind of with his body back at me." "He kept kind of pushing back into me, and . . . . [the sergeant] said just take him into detox and we'll control him and remove his property." Kulhanek testified that plaintiff refused to be fingerprinted.

As a result of plaintiff's behavior, officers had to place plaintiff in the detox cell, where they placed him on the floor to remove his property and some of his clothes. *There is no evidence that plaintiff suffered any injury as a result of Kulhanek's actions in the detox cell*.[2] Indeed, plaintiff has not alleged, or presented evidence, that Kulhanek (and not another officer) applied force in the detox cell. Plaintiff merely makes the conclusory allegation that "they abused me." Plaintiff nowhere specifies what force was applied in the detox cell. It is difficult to judge the reasonableness of a use of force where plaintiff does not specify what force was applied.

Viewing the evidence in a light favorable to plaintiff, Kulhanek's actions were objectively reasonable under the circumstances and no constitutional violation occurred. An intoxicated detainee was belligerent and refusing to be fingerprinted and processed. Some force was reasonably needed. It was objectively reasonable under the circumstances to place plaintiff in the detox cell and place him on the floor in order to accomplish reasonable governmental interests (controlling and processing a detainee). On the record before us, viewing the evidence in a light favorable to plaintiff, I would find there is insufficient evidence that excessive force was used by Kulhanek in the detox cell.

In this regard, I disagree with the majority's conclusion that I rely upon credibility determinations in concluding that Kulhanek's actions were objectively reasonable. Rather, I distinguish between plaintiff's assertions in opposition to summary disposition and the actual *evidence* presented by plaintiff in support of his assertions. Of the 13 exhibits attached to plaintiff's response to defendant's motion for summary disposition, only exhibit A, plaintiff's deposition transcript, addresses Kulhanek's conduct in the detox cell. Plaintiff's sole testimony on Kulhanek's alleged violative conduct was as follows: "…from the fingerprint thing, I end up on the floor. That's all I remember is me coming to the fingerprints, and I kept saying, I'm not resisting arrest. They slammed me on the floor." Accepting this testimony as true, plaintiff fails to contradict the evidence that he was intoxicated, belligerent, and combative when Kulhanek attempted to fingerprint him. In my judgment, plaintiff's deposition assertion that he *told* Kulhanek he was not resisting arrest is insufficient to contradict the evidence of plaintiff's belligerent *conduct* after Kulhanek transported him to the police station.[3]

I would also conclude that plaintiff did not suffer a constitutional deprivation when Yuchasz used the transport wrist lock, because Yuchasz's actions were objectively reasonable under the circumstances. Evidence indicates that plaintiff was moving his body in a manner suggestive of trying to evade an officer's grasp and possibly trying to flee. Evidence further indicates that Yuchasz only applied pressure with the transport wrist lock for a couple seconds, over a distance of a few feet. Thus, the amount of force applied was not great. The amount of

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[2] The lack of physical injury is an indicator of the lack of evidence of excessive force. See *McNair v Coffey*, 279 F3d 463, 469 (CA 7, 2002)(on remand).

[3] Contrary to plaintiff's assertion on appeal, plaintiff's only testimony that he was cooperative related to his conduct at the scene of the arrest. Plaintiff did not deny, and his deposition testimony does not contradict, Kulhanek's testimony that plaintiff was intoxicated, yelling, and pushing the front of his body off a counter or table back toward Kulhanek.

force applied, being moderate, was proportional to the need to use force (to control the detainee). For these reasons, the force applied by Yuchasz in using a transport wrist lock was objectively reasonable, and did not violate the fourth amendment. On the record before us, no reasonable jury could conclude that plaintiff suffered a constitutional deprivation when Yuchasz briefly applied a moderate amount of pressure in a maneuver that plaintiff does not contend is unconstitutional in itself.[4]

Because there was no constitutional deprivation, the first step in analyzing qualified immunity is not satisfied, *Saucier, supra* at 201, and there is no need to proceed to the second step.

Plaintiff next argues that the trial court erred in granting summary disposition of his assault and battery claims. I disagree.

"An assault is . . . any intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact." *Espinoza v Thomas*, 189 Mich App 110, 119; 472 NW2d 16 (1991). Battery is "the willful and harmful or offensive touching of another person which results from an act intended to cause such a contact." *Id.*

The governmental tort liability act, MCL 691.1401 *et seq.*, does not provide individual officers with immunity for intentional torts such as assault and battery. *Sudul v City of Hamtramck*, 221 Mich App 455, 458; 562 NW2d 478 (1997). However, a governmental officer's actions that would normally constitute intentional torts are shielded from liability if those actions are justified because they were objectively reasonable under the circumstances. *VanVorous v Burmeister*, 262 Mich App 467, 483; 687 NW2d 132 (2004). In Michigan, a police officer who uses excessive force may be held liable for assault and battery. *White v City of Vassar*, 157 Mich App 282, 293; 403 NW2d 124 (1987).

Here, there is no evidence that either defendant made an offer of corporeal injury toward plaintiff, or that plaintiff apprehended an imminent contact. Accordingly, the trial court correctly dismissed the assault claim for lack of a genuine issue of material fact under MCR 2.116(C)(10).

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[4] While plaintiff testified that he did not try to run away after he was removed from the police car by Yuchasz, his testimony does not contradict Yuchasz's testimony that plaintiff twisted and jerked his shoulders back and forth as though he was trying to break free. Thus, accepting as true plaintiff's assertion that his *conduct*, the actions of twisting and jerking his shoulders back and forth, were not an effort to escape, the *evidence* fails to create a genuine issue of material fact sufficient to overcome the shield of qualified immunity accorded to Yuchasz' actions.

Regarding the battery claim, there is scarce evidence regarding the degree of force applied by Kulhanek in the detox cell. Plaintiff makes the conclusory allegations that "they abused me," and that officers "slammed me down." But plaintiff provides no authority that where a detainee is intoxicated, belligerent and combative, officers must be gentle. A detox cell is a jail cell, and Kulhanek was justified in using (some unspecified amount of) force to effectuate the control and processing of plaintiff. There is too little evidence to raise a genuine issue of material fact regarding whether Kulhanek's use of force was excessive.

Regarding the assault claim against Yuchasz, evidence indicated that plaintiff was moving his body in a way suggesting he was trying to evade Yuchasz's grasp. Yuchasz testified that he "just held him in a transport wrist lock and walked him into the intake area . . . ."

Yuchasz's use of force was justified and reasonable. Yuchasz testified that he was just holding onto him at that point and just trying to keep him in one spot, and only had to apply pressure for a few seconds, over a distance of only a few feet. Then, after he got plaintiff to the door of the WCSD, he kept holding onto plaintiff, but stopped applying pressure because plaintiff stopped pulling away. Plaintiff never said anything to Yuchasz about his wrist hurting. Plaintiff's x-rays from that same day indicate no fracture.

Viewing the evidence in a light favorable to plaintiff, Yuchasz only used moderate force. Yuchasz had to use some degree of force to control plaintiff. Plaintiff failed to raise a genuine issue of material fact on the battery claim against Yuchasz, and the trial court correctly granted summary disposition under MCR 2.116(C)(10).

In conclusion, in my view, the trial court correctly granted summary disposition of plaintiff's § 1983 claim, because plaintiff failed to demonstrate a constitutional deprivation and the trial court also correctly granted summary disposition of the assault and battery claims, because defendants' uses of force were objectively reasonable and not excessive. I would affirm.

/s/ Kurtis T. Wilder